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PLR-130073-09

Date:

July 08, 2009

In Re:

Company =

Newco =

LLC 1 =

LLC 2 =

Sub 1 =

Sub 2 =

Sub 3 =

FSub =

Products =

Held Interests =

Industry =

Court =

Lender 1 =

Lender 2 =

A =

B =

Agreed Transaction =

Company Assets =

Unwanted Assets =

Sale Assets =

Priority Claims =

Senior Claimholders =

Senior Claims =

Loan =

Interim Loan 1 =

Interim Loan 2 =

Reorganization
Agreement =

Amount 1 =

Amount 2 =

Exchange =

Newco
Preferred =

Newco Series A
Warrants =

Instrument =

Newco Series B
Warrants =

Note 1 =

Note 2 =

Assumed Liabilities 1 =

Assumed Liabilities 2 =

Other Claims =

State =

Country =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Closing Date =

Month =

a =

b =

c =

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e =

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Dear :

This letter responds to your June 19, 2009 request for rulings on certain Federal income tax consequences of the series of proposed transactions described below (the "Proposed Transaction"). Additional information was submitted by letters dated June 30, 2009 and July 2, 6, and 8, 2009. The information provided in that request and in the subsequent correspondence is summarized below.

The rulings contained in this letter are based upon facts and representations submitted by the taxpayer and accompanied by a penalties of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process.

Summary of Facts

Company is a State corporation and the common parent of an affiliated group of corporations that files a consolidated Federal income tax return on a calendar year basis. Company and its a direct and indirect wholly owned domestic and foreign subsidiaries are engaged primarily in the development, production, and marketing of Products. Among its domestic and foreign subsidiaries, Company owns: (i) all of the interests in LLC 1, a limited liability company ("LLC") organized under State law; (ii) all of the stock of Sub 1, a State corporation; and (iii) all of the stock of FSub, a Country corporation that conducts Company's Country operations directly and through its affiliates. As of Date 1, Company also owned the Held Interests. Prior to Date 2, LLC 1 owned all of the stock of Sub 2, a State corporation, which owned all of the stock of Sub 3, a State corporation. On Date 2, Sub 2 converted into LLC 2.

Company's common stock is widely held and, prior to Date 3, was publicly traded. As of Date 4, Company had b shares of common stock outstanding. In addition, as of Date 1, Company had outstanding stock options, warrants, and rights under various equity compensation plans to acquire an aggregate of approximately c shares of Company common stock. The exercise prices of these options, warrants, and rights are in excess of the Date 5 closing price for such stock.

Company's total liabilities are in excess of \$d owed to more than e creditors, including the Senior Claims owed to the Senior Claimholders. On Date 1, Company entered into the Loan with Lender 1, pursuant to which Lender 1 agreed to provide

Company with a \$f secured term loan facility subject to certain conditions, including Company's issuance of Instrument to Lender 1. At the time when Lender 1 made the Loan, there was significant uncertainty about the ability of Company to continue as a going concern. In addition, Lender 1 imposed several restrictions on Company's corporate affairs as a condition of receiving advances under the Loan. The Loan has a maturity date of Date 6. As of Date 9, Company had borrowed from Lender 1 approximately \$g under the Loan, including all amendments and related agreements. Initially, amounts owed to Lender 1 under the Loan were secured by certain of Company's property other than the assets of Company that secure the Senior Claims. Agreements with respect to the Senior Claims and the Loan were amended to provide Lender 1 with a junior lien on the collateral securing the Senior Claims. FSub has borrowed approximately \$h from Lender 2 under other arrangements.

Company also has outstanding various unsecured bonds (the "Unsecured Bonds"). As of Date 4, the Unsecured Bonds had an aggregate principal amount of approximately \$i, with varying interest rates and maturity dates. Further, Company is obligated pursuant to agreements with A to transfer approximately \$j to B beginning in Month.

In addition to the obligations described above, Company has a significant amount of other unsecured debt, including trade payables, accrued expenses, pension liabilities, and various other liabilities, including capital lease obligations, operating lease obligations, and contractual commitments.

Company and each of Sub 1, LLC 2, and Sub 3 (the "Filing Subsidiaries") filed for bankruptcy protection under chapter 11 of title 11 of the United States Code in the Court on Date 5. Company requested the approval by the Court of Interim Loan 1 and Interim Loan 2, pursuant to which Lender 1 and Lender 2 agreed to provide Company an aggregate amount of \$k; Lender 1 and Lender 2 agreed to provide \$l and \$m pursuant to Interim Loan 1 and Interim Loan 2, respectively. Company filed a motion requesting that the Court approve the Proposed Transaction in the form set forth in the Reorganization Agreement (the "Newco Reorganization"). Interim Loan 1 and Interim Loan 2 were extended to Company upon approval by the Court. It is expected that the Company will borrow the full amount of Interim Loan 1 and Interim Loan 2 prior to the Exchange.

Newco was formed by Lender 1 for the sole purpose of effectuating the Newco Reorganization. Pursuant to the Reorganization Agreement: (i) Newco (or, at the direction of Newco, one or more newly-formed subsidiaries of Newco) will acquire the Company Assets in the Exchange; and (ii) Company will be obligated to liquidate no later than Date 8. Company will retain the Unwanted Assets, with an intention to sell or wind down those properties as expeditiously as possible, distribute any net cash proceeds to claimholders of Company, and liquidate for Federal income tax purposes. The Company Assets include the Sale Assets which are intended to be sold following the Exchange. In addition, it is anticipated that Newco will implement a holding

company structure for the Company Assets following the Closing Date. Although the specific steps to form the holding company have not been determined, it is anticipated that it will be accomplished through a series of transactions that either are disregarded for Federal income tax purposes, or qualify as a tax-free reorganization under section 368(a)(1)(F).

The Proposed Transaction

The Proposed Transaction is necessary for Newco and its affiliates to succeed to Company's business and continue its operations. To that end, Company, the Filing Subsidiaries, and Newco have proposed to undertake, subject to approval by the Court, the steps of the Proposed Transaction described below:

(i) On Date 9, Newco was formed by Lender 1 for the sole purpose of effectuating the Newco Reorganization. Lender 1 has or will transfer the Loan, approximately \$y of Interim Loan 1, and Instrument to Newco in exchange for (i) common stock of Newco that will represent approximately n percent of Newco's total outstanding common shares at the conclusion of the Proposed Transaction; and (ii) approximately \$o of the Newco Preferred.

(ii) On the Closing Date, Lender 2 will loan an additional \$p to FSub in exchange for a promissory note (the "\$p Lender 2 Loan"). In addition, Lender 2 will loan \$q directly to Newco (the "Transitory Lender 2 Loan"). Lender 2 will transfer the Transitory Lender 2 Loan, \$r of the \$p Lender 2 Loan, and its rights under the Interim Loan 2 to Newco (collectively, the "Lender 2 Equity Amount") in exchange for (i) common stock of Newco that will represent approximately s percent of Newco's total outstanding common shares at the conclusion of the Proposed Transaction; and (ii) approximately \$t of the Newco Preferred. The \$u portion of the \$p Lender 2 Loan that is not transferred to Newco will remain an outstanding obligation of FSub held by Lender 2 (the "New Lender 2 Loan Amount"). The Lender 2 Equity Amount and the New Lender 2 Loan Amount are collectively referred to herein as the "Lender 2 Funding."

(iii) On the Closing Date, Company will transfer the Company Assets to Newco in the Exchange for the following consideration: (a) common stock of Newco that will represent approximately w percent of Newco's total outstanding common shares at the conclusion of the Proposed Transaction; (b) the Instrument; (c) a credit bid of the Loan and approximately \$y of the Interim Loan 1; (d) a credit bid of the Interim Loan 2; (e) the assumption by Newco of Assumed Liabilities 1 (including Note 1) and Company's obligation to transfer \$j to B; and (f) Newco Series A Warrants. In addition, an adjustment to the above described consideration may be required pursuant to the Reorganization Agreement if the Court makes certain findings.

(iv) On or shortly after the Closing Date, Newco will issue the following consideration to B in satisfaction of Company's \$j obligation to B that was assumed in

the Exchange: (i) common stock of Newco that will represent x percent of Newco's total outstanding common shares at the conclusion of the Proposed Transaction; (ii) approximately \$y of Newco Preferred; (iii) the Newco Series B Warrants; and (iv) Note 2 issued by Newco.

(v) After the Closing Date, Company will attempt to sell or wind down the Unwanted Assets, and may sell the Newco common stock and Newco Series A Warrants received in step (iii) above.

(vi) Company will liquidate, distributing its remaining assets to Company's claimholders (possibly through use of a liquidating trust within the meaning of Treas. Reg. § 301.7701-4(d) for the benefit of such claimholders) no later than Date 8.

Newco and its affiliates and Company and its affiliates will have certain ongoing relationships. These relationships will be formalized in a transition services agreement.

Representations

Company makes the following representations regarding the Proposed Transaction:

- (a) Company will be under the jurisdiction of the Court in a case under title 11 of the United States Code at the time of the Exchange.
- (b) Provided that the Newco Reorganization is an Agreed Transaction, (i) the Reorganization Agreement will constitute a plan of reorganization for purposes of section 368, and (ii) the Court will approve the Newco Reorganization in the form of the Reorganization Agreement.
- (c) Lender 1 will receive Newco stock from Company in constructive exchange for a portion of the Loan.
- (d) In the Newco Reorganization, Newco will acquire more than 50 percent of the fair market value of the gross assets held by Company (including the stock of and interests in affiliates) as of Date 5 and more than 70 percent of the fair market value of the operating assets held by Company (including the stock of and interests in affiliates) as of Date 5. For purposes of this representation, operating assets are all of Company's assets other than cash, accounts receivable, and investment assets; however, the Unwanted Assets (*i.e.*, assets of Company that were taken out of operation with the intention of effecting a sale thereof) are not considered operating assets.
- (e) Lender 1, in its capacity as a creditor with respect to the Loan, will be the most senior class of Company creditors to receive an interest in Newco in the Newco

Reorganization in the form of common stock, preferred stock, or warrants in satisfaction of its claims against Company.

- (f) Taking into account (i) the value of Newco common stock and Newco Preferred to be received by Lender 1 with respect to the Loan, and (ii) the value of all consideration to be received by creditors of Company with respect to claims that are equal and junior to that of Lender 1 with respect to the Loan (collectively, the “proprietary interests” of Company), at least 40 percent of the fair market value of the total consideration received by all such holders of proprietary interests of Company will consist of Newco common stock and Newco Preferred. For purposes of this representation, (i) the Senior Claimholders and holders of Priority Claims are senior to the claim of Lender 1 with respect to the Loan, and (ii) neither Interim Loan 1 nor Interim Loan 2 will be treated as a creditor’s claim.
- (g) Amount 1 has been, or will be, used by Company to: (i) satisfy or pay the Senior Claims; and (ii) pay its existing debts when they become due, including payroll, Other Claims, interest, and other operating expenses.
- (h) There is no plan or intention for Newco, or for any party related to Newco (within the meaning of Treas. Reg. § 1.368-1(e)(4)), to redeem or acquire any Newco stock issued in the Newco Reorganization, either directly or through any transaction, agreement, or other arrangement with any other person.
- (i) The fair market value of the Newco common stock and Newco Preferred and any other consideration to be constructively received in the Newco Reorganization by Lender 1 and B will be approximately equal to the fair market value (at the time of the exchange) of such creditors’ claims constructively surrendered in exchange therefor.
- (j) The fair market value of the assets to be acquired by Newco in the Newco Reorganization will be approximately equal to the value of the consideration constructively issued by Newco in exchange therefor.
- (k) Except for the Sale Assets, Newco has no plan or intention to sell or otherwise dispose of any of the assets of Company acquired in the transaction, except for dispositions made in the ordinary course of business, transfers described in section 368(a)(2)(C) or Treas. Reg. § 1.368-2(k).
- (l) Newco (and members of Newco’s “qualified group,” within the meaning of Treas. Reg. § 1.368-1(d)) will continue the historic business of Company or use a significant portion of its historic business assets in a business.
- (m) Newco has no plan or intention to liquidate or merge with or into another corporation subsequent to the Newco Reorganization.

- (n) The liabilities of Company to be assumed by Newco (within the meaning of section 357(d)) were incurred by Company in the ordinary course of its business.
- (o) There is no intercorporate indebtedness existing between Company and Newco that was acquired at a discount, discounted, or will be treated as settled at a discount.
- (p) No two parties to the transaction are “investment companies” as defined in section 368(a)(2)(F)(iii) and (iv).
- (q) The total fair market value of the assets transferred by Company to Newco will exceed the sum of: (a) the amount of liabilities assumed (as determined under section 357(d)) by Newco in connection with the exchange; (b) the amount of liabilities owed to Newco by Company that were constructively discharged or extinguished in connection with the exchange; and (c) the amount of any money and the fair market value of any other property (other than stock permitted to be received under section 361 without the recognition of gain) received by Company in consideration for the transfer of the Company Assets to Newco. The fair market value of the assets of Newco will exceed the amount of Newco’s liabilities immediately after the Exchange.
- (r) Company will liquidate (as determined for Federal income tax purposes) no later than Date 8.
- (s) Company and Newco will each pay its own expenses, if any, in connection with the Newco Reorganization, except for transfer taxes and certain other expenses as described in the Reorganization Agreement.

Rulings

Based solely on the information submitted and the representations set forth above, we rule as follows:

1. For Federal income tax purposes, in the Lender 2 Funding, Lender 2 will be treated as: (i) transferring the Lender 2 Equity Amount to Newco in exchange for Newco common stock and Newco Preferred of equal value; and (ii) loaning the New Lender 2 Loan Amount to FSub (Revenue Ruling 72-343, 1972-2 C.B. 213).
2. For Federal income tax purposes, Lender 1 will be treated as transferring Amount 2 to Newco in exchange for Newco common stock, Newco Preferred, and Note 1 of equal value (Revenue Ruling 72-343, 1972-2 C.B. 213; Notice 2009-38, I.R.B. 2009-18, April 13, 2009).
3. For Federal income tax purposes, the Exchange will be treated as: (i) Company transferring the Company Assets to Newco in exchange for Newco common

stock, Newco Preferred, Newco Series A Warrants, Newco Series B Warrants, Note 2, Amount 1, and the assumption of Assumed Liabilities 2; and (ii) except to the extent sold by Company, Company distributing the Newco common stock, Newco Preferred, Newco Series A Warrants, Newco Series B Warrants, Note 2, and Amount 1 to satisfy creditor claims, including the claims of Lender 1, B, and possibly other Company claimholders (*Helvering v. Alabama Asphaltic Limestone Co.*, 315 U.S. 179 (1942)).

4. The Newco Reorganization (*i.e.*, the Exchange and the liquidation of Company) will constitute a reorganization within the meaning of section 368(a)(1)(G). Company and Newco will each be “a party to a reorganization” within the meaning of section 368(b).
5. No gain or loss will be recognized by Company on the transfer of the Company Assets to Newco in exchange for Newco common stock, Newco Preferred, Newco Series A Warrants, Newco Series B Warrants, Note 2, Amount 1, and the assumption of Assumed Liabilities 2 (sections 361(a), 361(b)(1)(A), 361(b)(3), and 357(a)).
6. No gain or loss will be recognized by Newco upon the receipt of the Company Assets from Company in exchange for Newco common stock, Newco Preferred, Newco Series A Warrants, and Newco Series B Warrants (section 1032(a)).
7. The adjusted basis of the Company Assets in the hands of Newco will be, in each instance, the same as the adjusted basis of such assets in the hands of Company immediately prior to the exchange (section 362(b)).
8. Newco’s holding period for the assets received from Company will include, in each instance, the holding period of those assets in the hands of Company immediately prior to the exchange (section 1223(2)).
9. No gain or loss will be recognized by Company upon the distribution of Newco stock or Newco obligations to Company claimholders (section 361(c)).
10. Pursuant to section 381(a) and Treas. Reg. § 1.381(a)-1, Newco will succeed to and take into account the items described in section 381(c), including the foreign tax credit carryovers of Company, on the date of the Exchange subject to reduction with respect to excluded cancellation of indebtedness income of Company as required by section 108, Treas. Reg. §§ 1.1502-28, and 1.108-7(c). These items will be taken into account by Newco subject to the provisions and limitations specified in sections 381, 382, 383, 384, 904, 1502, and the regulations thereunder (Treas. Reg. § 1.381(b)-1(b)(1); Revenue Ruling 70-27, 1970-1 C.B. 83; Revenue Ruling 80-144, 1980-1 C.B. 80).

11. To the extent that a claim of any Company claimholder qualifies as a security for Federal income tax purposes, no gain or loss will be recognized by such holder upon the receipt of solely Newco stock or Newco securities (including Newco Series A Warrants and Newco Series B Warrants) in exchange for the holder's Company security, except that the claimholder may recognize ordinary income to the extent that the consideration is treated as received in satisfaction of accrued but unpaid interest (section 354(a)). If a holder of a Company security also receives money or other property in exchange for a Company security, the holder will recognize gain in an amount not in excess of the fair market value of such money or other property (section 356(a)(1)). No loss will be recognized by such Company security holder (section 356(c)).
12. To the extent that a claim of any Company claimholder qualifies as a security for Federal income tax purposes, the adjusted basis of the Newco stock received by a Company claimholder will equal the adjusted basis of the Company security in the hands of the holder immediately before the distribution (excluding any amount attributable to interest which has accrued during the exchanging claimholder's holding period), less the fair market value of any money or other property distributed to the holder (excluding money or other property attributable to interest which has accrued during the exchanging claimholder's holding period), plus any gain recognized by the holder (section 358(a)(1)). The basis of money or other property received by a Company claimholder will be the fair market value of such money or other property (section 358(a)(2)).
13. To the extent that a claim of any Company claimholder qualifies as a security for Federal income tax purposes, the holding period of Newco stock received by such holder (other than Newco stock received with respect to a claim for accrued interest) will include the period during which the holder has held the Company security exchanged therefor, provided such Company security was a capital asset in the hands of the holder (section 1223(1)).

Caveats

No opinion is expressed about the Federal income tax treatment of the Proposed Transaction under other provisions of the Code or regulations or the Federal income tax treatment of any conditions existing at the time of, or effects resulting from, the Proposed Transaction that are not specifically covered by the above rulings.

Procedural Matters

This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this ruling letter must be attached to the Federal income tax return of each party involved in the Proposed Transaction for the taxable year in which the

Proposed Transaction is completed. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their returns that provides the date and control number of the letter ruling.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Lisa A. Fuller
Senior Counsel, Branch 1
Office of Associate Chief Counsel
(Corporate)